FILED
APR 7 1972

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

71-1294

No. A-934

MRS. JOSEPH WIMBER ALPHONSE, ET AL
versus
W. M. KINNER TRANSPORT CO., ET AL

MARY TRICH ZWEIFEL, ET AL
versus
DAVID CHARLIE PHARRIS, ET AL

TYRELL T. MANIERI
versus
W. M. KINNER, ET AL
(CONSOLIDATED CASES)

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STEVEN R. PLOTKIN
Attorney foe Petitioners
305 Baronne Street - 9th Floor
New Orleans, Louisiana 70112
524-1393

I N D E X

	Page
Table of Authorities	i
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Conclusion	11
Certificate of Service	11
Appendix "A"	12

TABLE OF AUTHORITIES

	Page
Bradley v. Public Utilities Commission, 289 U.S. 92	11
Continental Baking Company v. Woodring, 286 U.S. 352	11
Hicklin v. Coney, 290 U.S. 169	11
United States Fidelity & Guaranty Company vs. Colonial Baking Company, 247 S.W. 2d 997	11
Interstate Commerce Act, 49 USC 301, et seq.	9
Texas Civil Statute, Article 911 (b), Section 13	5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. A-934

MRS. JOSEPH WIMBER ALPHONSE, ET AL
versus
W. M. KINNER TRANSPORT CO., ET AL
: : : : : : : : : : :

MARY TRICH ZWEIFEL, ET AL
versus
DAVID CHARLIE PHARRIS, ET AL
: : : : : : : : : : :

TYRELL T. MANIERI
Versus
W. M. KINNER, ET AL

(CONSOLIDATED CASES)

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TO THE HONORABLES, THE CHIEF AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Mrs. Josephine Wimber Alphonse, wife of Mr. James Alphonse, individually and for the use and benefit of her minor children, Jill M. Alphonse and Jennifer J. Alphonse, and the

major children, Judith Alphonse, James R. Alphonse and Jacquelyn M. Alphonse, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered November 4, 1971, rehearing denied on December 13, 1971.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, printed in Appendix "A" hereof, is reported at 452 F. 2d 700 (1971). The opinion of the United States Court of Appeals, Fifth Circuit, denying the application for rehearing, printed in Appendix "A" is reported at 452 F. 2d 700 (1971).

JURISDICTION

The order of the United States Court of Appeals, Fifth Circuit, denying the petition for rehearing was entered on December 13, 1971. On or about March 9, 1972, the petitioners, Mrs. Joseph Wimber Alphonse, et al and Mary Trich Zweifel, et al submitted to the Clerk of Court for the United States Supreme Court a Motion for an Extension of Time, extending the time in which to file a petition for writ of certiorari. On March 13, 1971, the Honorable Lewis F. Powell, Jr. signed the order extending the time in which to file a petition for writ of certiorari to April 11, 1972. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED

Among other questions, the most significant presented here are the following:

1. Whether or not Endorsement 77 of the Texas Railroad Commission Form attached to and forming part of the insurance policy can limit and restrict coverage on an insurance policy intrastate when the Texas Civil Statute, Article 911(b), Section 13, made a part of the policy, extends that coverage interstate?

2. Whether or not a state has the power to extend its insurance requirements interstate as opposed to intrastate?

STATUTES INVOLVED

1. Texas Civil Statute, Article 911(b), Section 13

2. Interstate Commerce Act, 49 USC 301, et seq.

STATEMENT OF THE CASE

Mrs. Josephine Wimber Alphonse, et al concur that the following facts, as reported by the United States Court of Appeals on November 4, 1971, are essentially correct:

"These consolidated actions arise out of a collision on or about July 31, 1968, ...in Natchitoches Parish, Louisiana, of a 1958 International Truck tractor, pulling a pole trailer, loaded with poles ...and a vehicle driven by one Tyrell T. Manieri in which Louis Zweifel and Joseph Alphonse, decedents, (killed in the accident) were passengers. The tractor was being driven by David Charlie Pharris, an employee of W. M. Kinner d/b/a W. M. Kinner Transport Company,

The plaintiffs argue that Policy No. 61 GB 592470, issued to Kinner by mover, to be effective as of 12:01 a.m., February 25, 1968, provided coverage for this accident.....

The mover (appellee) denies coverage on the ground that the policy specifically excludes coverage of any Kinner vehicle under coverages A and C, while the automobile is used for the towing of any trailer owned or hired by the insured and not covered by like insurance in the company;...

The pole trailer involved in the accident herein was purchased by Kinner approximately four months prior to the date of the accident. Kinner testified under oath on his deposition that the trailer had been used approximately 15 times with a 1965 International truck tractor, and was attached to the 1958 International truck tractor at the time of the accident.

It is not disputed by counsel for the plaintiffs that the policy's fleet schedule names neither the pole trailer nor the 1958 International tractor as insured vehicles."

Continuing with the facts on Page 5 of the opinion of the Fifth Circuit, the Court states:

"Plaintiffs, faced with exclusion (c), then sought coverage under Endorsement 77, the Texas Railroad Commission Form. That endorsement provides in pertinent part,

> "The obligation and promises of this endorsement shall be effective only while the automobiles covered by this policy are being operated within the boundaries of the State of Texas. The coverage granted by this endorsement also applies to automobiles, trucks and trailers belonging to or under the direction of the named insured and not particularly identified in this policy, while the same are being used in the business of carrying property for hire or compensation ... occurring during the term of said policy through such operation of such trucks and trailers within the boundaries of the State of Texas." (Emphasis added)

Thus, Endorsement Form 77 provided insurance coverage to the tractor and trailer even though they were not particularly identified in the policy. The endorsement was attached to the policy because it was required by the Texas Motor Carriers Act, Acts 1929, 41st Leg., p.698, as amended, (Texas Civil Statutes, Article 911(b), Section 13). This section makes it mandatory that the insurance policy or bond in question cover "claims for loss or damages from personal injury or loss of, or injury to property occurring during the terms of said bonds and insurance and arising out of the actual operation of such motor carrier." The pertinent part of Texas Civil Statute reads as follows:

> "Before any permit or certificate of public convenience and necessity may be issued to any motor carrier and before any motor carrier may lawfully operate under such permit

or certificate as the case may be such motor carrier shall file with the Commission bonds and/or insurance policies issued by some insurance company including mutuals and reciprocals or bonding company authorized by law to transact business in Texas in an amount to be fixed by the Commission under such rules and regulations as it may prescribe, which bonds and insurance policies shall provide that the obligor therein will pay to the extent of the face amount of such insurance policies and bonds all judgments which may be recovered against the motor carrier so filing said insurance policies and bonds, based on claims for loss or damages from personal injury or loss of, or injury to property occurring during the term of said bonds and policies and arising out of the actual operation of such motor carrier; and such bonds and policies shall also provide for successive recoveries to the complete exhaustion of the face amount thereof and that such judgments will be paid by the obligor in said bonds and insurance policies irrespective of the solvency or insolvency of the motor carrier; provided, such bonds and policies shall not cover personal injuries sustained by the servants, agents or employees of such motor carrier . . . " (Emphasis added)

It can be seen from the quoted endorsement of the policy and the Texas law that the language of the endorsement limits coverage to claims while the vehicles are being operated within the state of Texas. It was our

contention that this (limited coverage) was illegal and the policy should be reformed, since it did not conform to the requirements of the Texas statute.

Kinner's operations as a motor carrier hauling various commodities were governed by the Texas Motor Carriers Statute. One of the requirements of this Statute is that the motor carrier must have liability insurance to cover "all judgments which may be recovered against the motor carrier . . . arising out of the actual operation of such motor carrier".

The endorsement specifically refers to the Texas Statute and its requirements are made a part of the policy. In Paragraph 25 on Page 5 of the policy it is specifically stated:

> "25. Terms of Policy Conformed to Statute:
> Terms of this policy which are in conflict with the statutes of the State wherein this policy is issued are hereby amended to conform to such statutes."

The statute in question should override the exclusion in the endorsement which prevented the policy from covering in this case. This limitation is not in the Texas statute. In fact, the limitation is directly contrary to the statute. The statute states unmistakably and unequivocally that the policy must cover all judgments arising out of the insured's operation during the policy's term. Nowhere does the statute say, "except for those which arise out of events outside the state", and since the statute does not say, "except", neither can the endorsement. It is hornbook law that an insurance policy provision which is called for by a statute must

conform to the statute. If it does not conform, it must be reformed.

Since the statute requires coverage of all judgments resulting from the actual operation of a motor carrier, a territorial limitation within the endorsement should not be permitted. This territorial limitation should be stricken from the endorsement by this Honorable Court. In the absence of this territorial limitation, the policy in question clearly covers the accident in suit and the judgment should be reversed and the case remanded with instructions to apply the policy as reformed to conform to the statute.

Petitioners argued these matters forcefully in the district and appellate courts. Since these courts did not decide the issue we had raised, we again reurged the question on petition for rehearing. In its Per Curiam on rehearing, the Fifth Circuit stated:

> "The plaintiffs-appellants urge that they are entitled to a decision of their insistence that the limitation of coverage to claims while the vehicles are being operated within the State of Texas is illegal and the policy should be reformed.
>
> We think that Texas Railroad Commission Endorsement 77 conforms in this respect with the Texas Statute when read in the light of the definition of "motor carrier" in Section 1(g) of the same statute. That definition contains a limitation that it applies to operation "over any public highway in this State."
>
> Further, we doubt whether Texas

had the power to extend its insurance requirement beyond the State's boundaries, particularly in the light of federal regulation of motor carriers in interstate commerce by Part II of the Interstate Commerce Act, 49 U.S.C. § 301 et seq. That Act provides in part:

> § 302. Application of provisions
>
> * * * * * * * * * * * * * * * * * *
>
> "(b)/(1) Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

We respectfully submit that the Fifth Circuit was in error in the foregoing holding. The Texas Statute does not contain a limitation that it applies to operation "over any public highway in this state". Section 1(g) referred to above simply defines a motor carrier as one operating "over any public highway in this state". Certainly, the "motor carrier" would not be any less a motor carrier when crossing the Texas boundary into the state of Louisiana. The Texas Statute simply does not distinguish between interstate and intrastate operations. Certainly, the Legislature in enacting the Texas Motor Carriers' Act had to be considering interstate operations. One cannot think of motor carriers hauling the various commodities authorized by

the Railroad Commission without being aware that these motor carriers may and do cross state lines. If the Texas Legislature had wanted to require insurance policies or bonds to cover only operations of the motor carriers within state boundaries, the Legislature would have so stated. Since the Texas Statute does not draw a distinction between intrastate and interstate operations, the language of the policy endorsement limiting loss to accidents within the boundaries of Texas is contrary and repugnant to the statute and the policy should be reformed to conform to the language of the statute.

Further, we respectfully submit the Fifth Circuit was in error in holding: "We doubt whether Texas has the power to extend its insurance requirements beyond the state boundaries". We respectfully submit that this doubt of the Appellate Court should have been resolved in favor of the petitioner. However, not resolving the doubt in favor of the petitioners, the Appellate Court below should have considered and given validity to the clause of the Hartford Accident and Indemnity policy which provided that if any terms of the policy were in conflict with the statutes of Texas, the policy should be amended to conform to the statute. As we understand Section 302 of the Interstate Commerce Act, it merely states that a state has the exclusive power to regulate intrastate commerce by motor carriers on its highways. The act does not say that the state does not have any power to extend its insurance requirements beyond the state's boundaries. Texas may not have the authority to require a Louisiana based motor carrier travelling into Texas to have insurance, but it would have the authority to require its own carrier to have insurance when crossing the boundaries of Texas into another state.

It has long been settled that states may require their interstate carriers furnish insurance similar to that involved here, and in various ways related to the protection of the public, impose requirements on interstate carrier operations. Hicklin v. Coney, 290 U.S. 169; Bradley v. Public Utilities Commission, 289 U.S. 92; Continental Baking Company v. Woodring, 286 U.S. 352. Such regulations aid interstate commerce. United States Fidelity and Guaranty Company v. Colonial Baking Company, 247 S.W..2d 997.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEVEN R. PLOTKIN
Attorney for Petitioners
305 Baronne Street - 9th Floor
New Orleans, Louisiana 70112
524-1393

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for A Writ of Certiorari were mailed to opposing counsel this _____day of April, 1972.

STEVEN R. PLOTKIN

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1305

MRS. JOSEPH WILMER ALPHONSE, ET AL.,
Plaintiffs-Appellants,

versus

W. M. KINNER TRANSPORT CO., ET AL.,
Defendants-Appellees,

MARY TRICH ZWEIFEL, ET AL.,
Plaintiffs-Appellants,

versus

DAVID CHARLIE PHARRIS, ET AL.,
Defendants-Appellees,

TYRELL T. MANIERI,
Plaintiff-Appellant,

versus

W. M. KINNER, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana

(November 4, 1971)

Before RIVES, AINSWORTH and GODBOLD, Circuit Judges.

PER CURIAM: The appended opinion of Judge Boyle is adopted as the opinion of this Court, and the judgment is

AFFIRMED.

APPENDIX

This matter came on for hearing before the Court on the motion of the defendant, Hartford Accident and Indemnity Company, for summary judgment.

These consolidated actions arise out of the collision on or about July 31, 1968, at approximately 11:45 a.m. in Natchitoches Parish, Louisiana, of a 1958 International Truck tractor, pulling a pole trailer, loaded with poles under contract with the C.R. Knotts Company, and a vehicle driven by one Tyrell T. Manieri in which Louis Zweifel and Joseph Alphonse, decedents, were passengers. The tractor was being driven by David Charlie Pharris, an employee of W. M. Kinner, d/b/a W. M. Kinner Transport Company.

The plaintiffs argue that Policy No. 61 GB 592470, issued to Kinner by mover, to be effective as of 12:01 a.m. February 25, 1968, provided coverage for this accident. The original policy was produced and offered

in evidence by defendant, Kinner, the insured thereunder.[1]

The mover denies coverage on the ground that the policy specifically excludes coverage of any Kinner vehicle under coverages A and C, "while the automobile is used for the towing of any trailer owned or hired by the insured and not covered by like insurance in the company; . . ."[2]

The pole trailer involved in the accident herein was purchased by Kinner approximately four months prior to the date of the accident.[3] Kinner testified under oath

---

[1]In support of his motion, counsel for Hartford annexed a certified copy of the policy in question. The copy for challenged by the plaintiffs because the policy indicated Endorsement 111D was in effect, although the attached endorsement bore #110D. A second certified copy of the policy indicating Endorsement #110D was then furnished by Hartford. Counsel for the plaintiffs urged that this typographical error in the first policy created an issue of fact precluding summary judgment; however, form #110D proved to be no more than a long-haul trucking exclusion of coverage in certain designated areas, none of which were, in fact, excluded by the company or relevant to the instant action. Counsel for Kinner, at the second hearing on this motion, produced Kinner's copy of the policy, which includes the following endorsements:

1) Form 45 . . fleet schedule describing insured vehicles (neither the 1958 tractor nor the trailer is scheduled therein).

2) Form 112A — loss payable clause naming the Lufkin National Bank, as its interest may appear.

3) Form 110D — the aforementioned long haul truckmen's exclusion of designated areas.

4) Form 77 — motor vehicle endorsement — Texas Railroad Commission.

5) Form 230 — Family protection against uninsured motorists.

[2]Exclusions, page 3, paragraph (c), policy.

[3]Deposition of W. M. Kinner, page 55, lines 24, 25; page 56, lines 1-3.

on his deposition that the trailer had been used approximately 15 times with a 1965 International truck tractor,[4] and was attached to the 1958 International truck tractor at the time of the accident.[5]

It is not disputed by counsel for the plaintiffs that the policy's fleet schedule names neither the pole trailer nor the 1958 International trailer as insured vehicles.[6] Further, Mr. Kinner himself admitted under oath that the pole trailer was NEVER insured under the Hartford policy.[7] Kinner gave testimony earlier in his deposition that further strengthened the premise that the trailer in question was not covered, for at page 26, lines 20-27, he admitted that after he knew that something had happened and that an accident had occurred, he called his insurance agent in a futile attempt to get insurance coverage on the truck and trailer effective at midnight the night before. This request was made between 2:30 and 2:40 on the afternoon of the accident.[8]

Counsel for the plaintiffs herein made several arguments as to coverage of the tractor. Studiously avoiding the exclusion of coverage based on the lack of trailer insurance, counsel for the plaintiffs, in memoranda and supplemental memoranda, advanced several theories under which the 1958 tractor alone might

---

[4]Deposition of W. M. Kinner, page 56, lines 8-16.
[5]Deposition of W. M. Kinner, page 56, lines 21-24.
[6]Policy No. 61 GB 592470, "Fleet Schedule," Form 45.
[7]Deposition of W. M. Kinner, page 56, lines 21-25; see also same deposition, at pages 54, ll. 16-20, 54, ll. 25, and 5, ll. 1-4.
[8]Deposition of W. M. Kinner, page 60, ll. 18-21.

be covered. The plaintiffs would classify the tractor as a newly acquired automobile, a replacement vehicle, and/or a temporary substitute vehicle. Assuming, *arguendo*, that such bases for coverage of the tractor are tenable, coverage is nonetheless excluded because under no theory is the trailer an insured vehicle, and exclusion (c) specifically provides that failure to insure such a trailer operates to cancel coverage on the towing vehicle while the uninsured trailer is attached thereto.

Plaintiffs, faced with exclusion (c), then sought coverage under Endorsement 77, the Texas Railroad Commission Form. That endorsement provides in pertinent part,

> "The obligations and promises of this endorsement shall be effective only while the automobiles covered by this policy are being operated within the boundaries of the State of Texas. The coverage granted by this endorsement also applies to automobiles, trucks and trailers belonging to or under the direction of the named insured and not particularly identified in this policy, while the same are being used in the business of carrying property for hire or compensation . . . [for injuries] occurring during the term of said policy through such operation of such trucks and trailers within the boundaries of the State of Texas."

Plaintiffs' reliance on this provision of Endorsement 77 is patently misplaced for the endorsement clearly

states, without ambiguous language, that this endorsement does not apply to operation of the vehicle outside the boundaries of the State of Texas.* In the face of the clear language of the policy, which is the law between the parties thereto, the tractor and trailer, at the time and place of the accident, were not covered by the Hartford policy.

Under the policy in evidence there is no coverage provided for the accident in suit and therefore the motion of the defendant, Hartford Accident and Indemnity Company, for a summary judgment dismissing the claims of the plaintiffs as against this defendant should be and the same is hereby GRANTED.

(Signed) ESB, Sr.
[Edward S. Boyle, Sr.
United States District Judge
Eastern District of Louisiana]

---

*In his supplemental memorandum, counsel for plaintiff, Alphonse, cited this endorsement, selectively excluding all references in the endorsement limiting the effect thereof to operations within the boundaries of the State of Texas.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

(December 13, 1971)

ON PETITIONS FOR REHEARING

Before RIVES, AINSWORTH and GODBOLD, Circuit Judges.

PER CURIAM: In the first entitled case, the plaintiffs-appellants complain that there is no reference in the District Court opinion adopted by this Court deciding the issue raised in both courts that Texas Civil Statutes Article 911(b), Section 13 makes it mandatory that the insurance policy cover "claims for loss or damages from personal injury or loss of, or injury to property occurring during the terms of said *** insurance, and arising out of the actual operation of such motor carrier," while Texas Railroad Commission Motor Vehicle Endorsement Form 77 attached to the policy here involved provides that, "The obligations and promises of this endorsement shall be effective only while the automobiles covered by this policy are being operated within the boundaries of the State of Texas." The plaintiffs-appellants urge that they are entitled to a decision of their insistence that the limitation of coverage to claims while the vehicles are being operated within the State of Texas is illegal and the policy should be reformed.

We think that Texas Railroad Commission Endorsement 77 conforms in this respect with the Texas Statute when read in the light of the definition of "motor

carrier" in Section 1(g) of the same statute. That definition contains a limitation that it applies to operation "over any public highway in this State."

Further, we doubt whether Texas had the power to extend its insurance requirement beyond the State's boundaries, particularly in the light of federal regulation of motor carriers in interstate commerce by Part II of the Interstate Commerce Act, 49 US.C. §301, *et seq.* That Act provides in part:

> "§ 301. *Application of provisions*
>
> * * * *
>
> "(b) Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

We hold that the plaintiffs-appellants are not entitled to have the policy reformed to cover claims arising out of operations of the motor carrier beyond the boundaries of the State of Texas.

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby

DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.